SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 156

LAWRENCE YEARSLEY and GEORGE YEARSLEY,

Petitioners,

vs.

W. A. ROSS CONSTRUCTION COMPANY, a corporation,

Respondent.

BRIEF OF PETITIONERS

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To The Honorable, The Supreme Court of the United States:

A writ of certiorari was granted for review of the decree of the United States Circuit Court of Appeals for the Eighth Circuit reversing a judgment of the United States District Court, for the District of Nebraska, Lincoln Division. (See p. 26 of the record for the judgment of the District Court and pp. 180 et seq. for the decree of the C. C. A.)

The sole question presented to this court on the petition for writ of certiorari is, whether the building of dikes in the Missouri River which diverted the current, which, after its diversion eroded plaintiffs' land, constituted an appropriation or taking of the property for which compensation should be made, or whether the loss suffered by plaintiffs was merely "consequential damages" incident to a pub-

lic undertaking which must be borne without any right to compensation.

STATEMENT OF THE CASE

This is a law action, originally commenced in the district court of Otoe county, Nebraska, and on petition of the defendant, Ross Construction Company, was removed to the United States District Court for the District of Nebraska, Lincoln Division. (See Order of Removal, Tr. p. 8.) Thereafter an amended petition was filed by plaintiffs, Lawrence Yearsley and George Yearsley, petitioners herein. After issue was joined the cause came on for trial before the Honorable Thos. C. Munger, United States District Judge, and a jury, May 18, 1938 (Record page 23). Petitioners herein alleged that they were the owners of an undivided two-thirds interest of 250 acres of land and accretion land adjacent thereto, on the west bank of the Missouri River in Section 31, Township 8, Range 15, Otoe County, Nebraska and the defendant A. M. Stephenson was the owner of the other one-third interest; that the Ross Construction Company, respondent herein, was engaged in construction work on the Missouri River, changing the course of said river and had built dikes in said river and used large boats with paddles and pumps to produce artificial erosion and had washed away 100 acres more or less, of plaintiffs' land; that said land was of the value of $50.00 per acre. (And alleged other items of damage which were withdrawn from the jury.) (See pages 10 and 11 record.)

The defense so far as material to a determination of the question involved here was based upon the proposition that the work was done and performed under a written contract with the United States Government and under

the direction of the Secretary of War, and supervision of the Chief of Engineers of the United States, for the purpose of improving navigation of the Missouri River, as authorized by an Act of Congress (Record, pages 12-15). Plaintiffs, in their reply (page 22 record), admitted that defendant was operating under a contract with the government, but alleged that the contract did not contemplate the taking of plaintiffs' land without just compensation and due process of law; that the defendant's acts resulting in the destruction of plaintiffs' land were in violation of plaintiffs' rights under the 5th amendment to the United States Constitution prohibiting the taking of private property for public use without just compensation.

So far as material at this time, the case as submitted to the jury involves claim for damages for destruction of plaintiffs' land caused by the construction of dikes No. 602.7 and its trailer dike, 602.7A and 601.9 each of which were constructed by the respondent Ross Construction Company, under a contract with the United States Government, and by washing done by paddle boats of the defendant company in the construction of said dikes. There was approximately 95 acres of plaintiffs' land washed away. The value and character of this land is the subject of testimony offered by both plaintiffs and defendant, and as that was a question of fact solely for the determination of the jury, this Court, no doubt, will not undertake to review it.

It is established by the evidence that the two dikes built upon the river above and the one dike opposite this land, diverted the channel or current of the Missouri river from the Iowa shore to the Nebraska shore with the result that this diversion and the paddle washing eroded and carried

away plaintiffs' land, and that the land was cut away for the purpose of fixing a stabilized bank for the river.

The jury's verdict was in favor of the plaintiffs in the sum of $806, and judgment was entered on the verdict (Tr. p. 26).

Thereafter an appeal was taken by the respondent herein, to the United States Circuit Court of Appeals for the Eighth Circuit, and in an opinion written by Circuit Judge Sanborn, May 10, 1939 (See record page 180) the judgment of the District Court was reversed, the Circuit Court concluding that the District Court erred in failing at the close of the evidence, to direct a verdict in favor of the defendant, contractor, respondent herein.

The Circuit Court of Appeals resolved the issue into a single question which it stated as follows: "The vital question of this case is, whether the building of the dikes in the Missouri river, which diverted the current, which, after its diversion eroded the plaintiffs' land, constituted an appropriation or taking of property for which compensation should be made, or whether the loss suffered by plaintiffs was 'merely consequential damages incident to a public undertaking which must be borne without any rights to compensation' " (See record p. 183).

That is the question hereby presented to this Court.

The conflicting testimony as to the nature, character and value of plaintiffs' land was for the jury to decide. We briefly set forth the evidence insofar as it concerns plaintiffs' land which was destroyed by defendant in its ope ations on the river.

It was good blue grass pasture and sweet clover land, and some of it was in cultivation (Tr. p. 41); there were

about 18 to 20 acres of corn land, on which in 1933 or 1934, and witness believed it was in 1933, the corn looked like it would go 35 to 40 bushels per acre (See testimony of Alfred Wallen, pages 53 and 54 of the record). Plaintiff valued the land at $50 per acre (Tr. p. 42); Mr. Wallen estimated it from $40 to $50 an acre, depending on the kind of land (Tr. p. 54). Defendant's witnesses valued it at from $5 to $6 an acre (Tr. pp. 133-137) but later, as shown on page 137 of the transcript, the witness Lathrop stated that his opinion of the value would be changed if he had seen sweet clover, blue grass or corn growing on the land. Neither of these witnesses who testified as to value had been on the land prior to its destruction (Tr. pp. 134 & 137).

Plaintiff testified that defendant washed about 25 or 30 acres of his land away with paddle boats and that he lost about twice that much; that the dikes and the boats cut the land away. M. A. Pauley, who worked for defendant construction company, testified that he saw the defendant doing paddle-washing next to Yearsley's land; he testified that the force of the water would wash the bank away. He testified that there was blue grass, sweet clover and some willows on the land washed into the river (See pages 51 and 52 of the record). Plaintiff lived on this land since 1930 and never saw the waters of the Missouri river on his blue grass or pasture land (Tr. p. 41).

Witness Charles Shannon, a surveyor at Nebraska City, called by both parties, testified that there is approximately 95 acres less land on the east side of the Yearsley deeded land than there was in 1930 (see page 51 of record); when called by the defendant, Shannon testified that the river had built constantly to the east since 1856 (page 68 of record).

(Corroborative of this and of more than passing interest to this court is the case of *Topping* v. *Cohn*, 71 Neb. 559, decided by the Nebraska Supreme Court and involving the very section of land in which the Yearsley tract is located. The map or diagram made a part of the Nebraska reports shows that the major portion of Section 31 and the major portion of even the deeded land of Yearsley is land built up by accretion since the original government survey in 1856).

Defendant's witness Dodd testified that a part of the land which his labor party cleared in June, 1937, was in the river at the time of the trial; the average width of the area would be about 150 feet (Record pages 116, 117).

Charles C. Cook, a civil engineer, and witness for defendant, referring to dike 602.7A testified:

"This dike was run out by parts and was not constructed all at one time, because it was as close to the land as we dared go under our plans and orders and we had to continue our washing at the end of this dike before we could lengthen it out."

(See record p. 128.)

From this single statement of an engineer in charge of the operations of the defendant at least a portion of the time, it is clear that the work being done contemplated at the very outset, the immediate destruction of a portion of plaintiffs' property.

The contracts with the United States under which defendant was operating have the following pertinent provisions which should be considered by the court:

"60. Liability of the Contractor. (c) The United States will not secure nor lease land necessary for the contractor's use, nor be responsible for trespassing upon or injury to private lands or other property by the contractor or his employees.

(Pg. 84, Record)

"(b) Bidders are expected to visit the locality of the work, and to make their own estimates of the facilities needed, the difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather and other contingencies.

(Pg. 79, Record)

"Art. 10. Permits and care of work. The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

(Pg. 74, Record)

"49. Damage. Damage to Government property due to failure of the contractor to take reasonable precaution, and all loss or deterioration of or damage to the permanent work by flood, accident, or exposure prior to final acceptance, shall be made good by the contractor without expense to the United States. He will also be held responsible for any damage done to adjoining property through his neglect or failure to protect the work properly."

(Pg. 87, Record)

STATEMENT OF POINTS TO BE ARGUED

I.

Where property, title to which is admitted to be in a private citizen, is taken for a public use or destroyed by one engaged in prosecuting public works, there is an implied obligation to make just compensation to the owner, and the fact that such property is destroyed in improving a navigable stream does not deprive the owner of his right to compensation.

U. S. v. *Cress*, 243 U. S. 316, 37 S. Ct. 380.

Pumpelly v. *Green Bay & M. Canal Co.*, 80 U. S. 166, 20 L. Ed. 557.

U. S. v. *Lynah*, 188 U. S. 445, 47 L. Ed. 539.

U. S. v. *C. B. & Q. Rr. Co.*, 82 Fed. (2d) 131 (8 C. C. A.).

U. S. v. *C. B. & Q. Rr. Co.*, 90 Fed. (2d) 161 (7 C. C. A.).

U. S. v. *Buffalo Pitts Co.*, 234 U. S. 228, 58 L. Ed. 1290:

Section 591, 33 U. S. C. A.

Jacobs v. *U. S.*, 45 Fed. (2d) 34.

U. S. v. *Welch*, 217 U. S. 333, 30 S. Ct. 527, 54 L. Ed. 787.

II.

Accretion land is private property which is protected by and is within the purview of the fifth amendment to the constitution.

Corpus Juris, Vol. 45, p. 524 (Sec. 192).

Topping v. *Cohn*, 71 Neb. 559, 99 N. W. 372.

U. S. v. *Holt State Bank*, 294 Fed. 161, 270 U. S. 49.

Okla. Land Office Commissioners v. *U. S.*, 270 Fed. 110, 260 U. S. 753.

St. Louis v. *Rutz*, 138 U. S. 226, 11 S. Ct. 337.

III.

"Consequential damages" are those which do not arise as immediate, natural and probable result of act done, buf arise from interposition of additional cause, without which the act done would have produced no harmful results; while "proximate damages" are those which occur directly and in natural sequence, and are specific result of the act done without intervention of independent cause.

U. S. v. *C. B. & Q. Rr. Co.*, 82 Fed. (2d) 131.

U. S. v. *Lynah*, 188 U. S. 445, 47 L. Ed. 539.

BRIEF AND ARGUMENT

We concede the correctness of the contention of the dedendant, which is in effect approved by the Circuit Court of Appeals for the Eighth Circuit, that the government has the right to direct and change the channel of the Missouri River within its natural level, width and flow where it is done for the purpose and in the process of improving navigation of the river, but we submit that when in making such change it becomes necessary to appropriate land of a riparian owner, which land is not a part of the river bed of the navigable stream, for the purpose of changing the river's course as was done in this case, then the government's right is subject to and within the provisions of the Fifth Amendment to the United States Constitution that private property shall not be taken for public use without compensation (See *U. S.* v. *Cress*, 243 U. S. 316, 37 S. Ct. 380).

The term "river bed" has a well-defined meaning. Circuit Judge Hook, speaking for the Eighth Circuit Court of Appeals, in an opinion in the case of *Harrison* v. *Fite*, 148 Fed. 781, said:

> "The bed of a navigable stream is that soil so usually covered by water that it is wrested from vegetation, and does not extend to or include that upon which grasses, shrubs, and trees grow, though covered by the great annual rises." (Syl. 3.)
>
> (To same effect see *Howard* v. *Ingersoll*, 54 U. S. 380, 14 L. Ed. 189, 207.)

Congress recognized this limitation on the power of the government in its enactments authorizing improvement of navigable streams, when it enacted what is now Section 591, 33 U. S. C. A. wherein it provided for condemnation of lands necessary to be taken in river improvement.

It is, we believe, the usual procedure for the government to so acquire land by eminent domain before it takes private property for these purposes. It did not do so in this case, however, and the defendant now seeks to justify its acts by asserting that there has been no taking of private property within the Fifth Amendment and that whatever was done was done for the purpose of improving navigation of the river and done under the direction of the Army Engineers and any damage was incidental and consequential.

As we shall hereinafter point out, the decision of the Circuit Court of Appeals for Eighth Circuit, rests upon cases in which there was no actual taking of private property and where there was no physical invasion of private property. The distinction is well pointed out by the annotator who wrote the note in 21 A. L. R. 204:

> "As applied to the Federal Government, the Supreme Court seems to have drawn the line somewhat sharply in some cases, between the taking of property for the purpose of improvement of navigation, and the damaging of property for the same purpose. The reason for the distinction may lie in the fact that the Federal Constitution forbids the taking of private property for public uses without making just compensation, while it is entirely silent upon the subject of damaging private property for a like purpose. *Gibson* v. *United States*, 166 U. S. 269, 41 L. Ed. 996, 17 S. Ct. Rep. 578; *Bedford* v. *United States*, 192 U. S. 217, 48 L. Ed. 414, 24 Sup. Ct. Rep. 238."

The distinguished trial judge who heard this case had by reason of the length of time required to complete the trial, an unusual opportunity to exercise his usual diligence and study of the issues involved. The cases on which plaintiffs rely and on which he relied in overruling the motions for directed verdict and in submitting the case to the jury, we believe support his action.

In the case of *Pumpelly* v. *Green Bay & M. Canal Co.*, 80 U. S. 166-182, 20 L. Ed. 557, the action was for damages for the flooding of plaintiff's land by the Canal Company under a state statute authorizing the improvement of Fox River for navigation. The defendant pleaded the statute and urged that flooding plaintiff's land was not a "taking" within the protection of the State Constitution. In denying this contention, Mr. Justice Miller, who delivered the opinion of the court, said:

> "The argument of the defense is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government has a right to for the improvement of its navigation.
>
> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of an individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislature to change or control them, it shall be held that if the government refrains from absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not taken for public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizens, as those rights stood at common law, instead of the government and make it an authority for the invasion of private right under the pretext of public good, which had no warrant in the laws or practice of our ancestors."

The Court then reviews a number of decisions pertinent to the issues and further says:

> "We do not think it necessary to consume time in proving that when the United States sells land by treaty or otherwise, and parts with the fee by patent without reservation, it retains no right to take that land for public use without just compensation, * * * ; *and that the absolute ownership and right of property in such land is not varied by the fact that it borders on a navigable stream.*" (Italics ours.)

In the case of *United States* v. *Lynah*, 188 U. S. 445, 47 L. Ed. 539, which was an action for damages for flooding plaintiff's land, the court refers with approval to and quotes at length from the opinion in the case of *Pumpelly* v. *Green Bay & M. Canal Co.*, supra, and other authorities and then says:

> "It is clear from these authorities that where the government by the construction of a dam *or other public works* so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th amendment. While the government does not directly proceed to appropriate the title, *yet it takes away the use and value;* when that is done, it is of little consequence in whom the fee may be vested." (Italics ours.)

The case of *United States* v. *Cress*, 243 U. S. 316, 37 S. Ct. 380, involved a claim for compensation for the taking of land and water rights by means of backwater resulting from the construction and maintenance by the government of locks and dams upon two navigable streams in aid of the navigation of those streams. Mr. Justice Pitney distinguishes, we believe, all of the cases cited and relied on by Eighth Circuit in reversing this case, that had been decided up to the time of the handing down of his decision. He said in part in his opinion:

"But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the Fifth Amendment. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336; 37 L. Ed. 463, 471, 13 Sup. Ct. Rep. 622; *United States* v. *Lynah*, 188 U. S. 445, 465, 471, 47 L. Ed. 539, 546, 549, 23 Sup. Ct. Rep. 349. And we deem it clear that so much of the properties of the respective defendants in error as was unaffected by the flow of the rivers or their tributaries prior to the construction of the locks and dams in question was private property, and not subject to be overflowed, without compensation, in the raising of the level of the rivers by means of these artificial dams.

"These cases have no proper relation to cases such as *Gibson* v. *United States*, 166 U. S. 269, 41 L. Ed. 996, 17 Sup. Ct. Rep. 578, *where no water was thrown back on claimant's land*, and the damage was confined to an interference with the access thence to the navigable portion of the river; *Scranton* v. *Wheeler*, 178 U. S. 141, 153, 45 L. Ed. 126, 21 Sup. Ct. Rep. 48, which likewise had to do with the interruption of access from riparian land to a navigable channel; *Bedford* v. *United States*, 192 U. S. 217, 225, 48 L. Ed. 414, 417, 24 Sup. Ct. Rep. 238, where the damage to claimant's land resulted from operation conducted by the government 6 miles farther up the river; *Jackson* v. *United States*, 230 U. S. 1, 23, 57 L. Ed. 1363, 1374, 33 Sup. Ct. Rep. 1011, where owners of lands on the east bank of the Mississippi claimed compensation as for a taking of their property by reason of the effect of levees designed to prevent crevasses, retain the water in the river, and thus improve the navigation. In each of these, *there was no direct invasion of the lands of the claimants*, the damages were altogether consequential, and the right to compensation was denied on that ground. . . . . There is no difference of kind, but only of degree, between a

permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitable recurring overflows: and, on principles, the right to compensation must arise in one case, as in the other."

The Circuit Court of Appeals for the Eighth Circuit had occasion to cite the foregoing authorities with approval in the case of *United States* v. *C. B. & Q. R. R. Co.*, 82 Fed. (2d) 131, in which it was said in part:

"In final analysis, the case really presents but a single question. That question is: What constitutes that 'just compensation' which is guaranteed to the owner of private property when that property is taken for public use? See Fifth Amendment, Constitution of the United States. As a foreword, it may be premised that, if well nigh the unanimous voice of stare decises shall be heeded, appellee had the right to build its railroad along the bank of the Mississippi even though a navigable stream, and that in so doing it had the legal right to rely upon the continued maintenance of the natural level, width and flow thereof. And that the right to increase artificially this level, width and flow (to the hurt of appellee) beyond that provided by nature, could be obtained by appellant only by the exercise of the right of eminent domain, and the payment to appellee of just compensation, for the damages by it sustained. *United States* v. *Lynah*, 188 U. S. 445, 23 S. Ct. 349, 47 L. Ed. 539; *United States* v. *Cress*, 243 U. S. 316, 37 S. Ct. 380, 61 L. Ed. 746; *Jacobs* v. *United States*, (C. C. A.) 45 Fed. (2d) 34; *United States* v. *Wheeler Township*, (C. C. A.) 66 Fed. (2d) 977."

The Eighth Circuit, in that opinion suggested further that the decision in the case of *Gibson* v. *United States*, 166 U. S. 269, now approved by it as applicable to the issues in this case, sets forth a rule "so obviously unjust that it has become outmoded and has been discarded practically in all jurisdictions."

We submit, that the statement of the Eighth Circuit in the case of *United States* v. *C. B. & Q. Rr.*, supra, is sound; that the rule applied in that case should have been applied in the instant case; as shown by the facts in this case, any other rule than one which would permit a riparian owner such as plaintiff to obtain pay for his land taken in the river navigation improvement, would be manifestly unfair and unjust. It has been well suggested by one of the reviewers that the government has the right to improve navigation for the purpose of commerce but it is not just that in doing so, an undue burden should fall on the shore-owners who are made to contribute their property to the improvement where others contribute only a share of taxes. *United States* v. *Cress*, 243 U. S. 316. If the Circuit Court of Appeals for the Eighth Circuit should be affirmed in this, the plaintiffs will be compelled to contribute their property to such improvement, while the rest of the citizens only contribute their proportionate share of taxes; a result which is manifestly unjust, contrary to the Fifth Amendment to the United States Constitution and to the construction given it by this court in numerous decisions wherein it has been invoked.

It has been urged and no doubt will be urged to this court, that the land of plaintiffs was a part of the river bed.

> "The river bed is the land upon which the action of the water has been so constant as to destroy vegetation. It does not extend to, nor include the soil upon which grasses, shrubs and trees grow. *Harrison* v. *Fite*, (C. C. A.) 148 Fed. 781. Beyond that the government cannot go without compensation for proximate damages."
>
> *United States* v. *C. B. & Q. Rr. Co.*, 90 Fed. (2d) 161, 302 U. S. 714.

The evidence revealed that the land destroyed and cut away by respondent, was blue grass, sweet clover and

pasture land; and some of it was in cultivation (Tr. pp. 41, 52, 53, 54).

Nor can it be seriously urged that the washing away of plaintiffs' land in the manner established by the evidence was consequential damage as distinguished from proximate damage.

> "Ordinarily 'consequential damages' are those which do not arise as immediate, natural and probable result of an act done, but arise from interposition of additional cause, without which the act done would have produced no harmful results, while 'proximate damages' are those which occur directly and in natural sequence, and are specific results of the act done without the intervention of independent cause."
>
> *United States* v. *C. B. & Q. Rr. Co.*, 82 Fed. (2d) 131.

We think the definition correct and it is applicable to the facts in this case. The destruction of plaintiffs' land was simultaneous with the projecting of the dikes toward his banks and the paddle-washing that was employed for that very purpose.

In deciding the question stated in its opinion, i. e. "Whether the building of the dikes of the Missouri river which diverted the current, which, after its diversion, eroded the plaintiffs' land, constituted an appropriation or taking of property, for which compensation should be made, or whether the loss suffered by plaintiffs was 'merely consequential damage incident to a public undertaking which must be borne without any right to remuneration' " against the plaintiffs, the Circuit Court of Appeals for the Eighth Circuit rested its decision upon the opinion in the case of *Franklin* v. *United States*, 101 Fed. (2d) 459, from the Circuit Court of Appeals for the Sixth Circuit, which is

now pending in this Court on writ of certiorari granted. Therefore, it is pertinent we think, to review briefly, the cases relied upon in the Franklin case by Judge Allen in the opinion on behalf of the Circuit Court of Appeals for the Sixth Circuit.

The case of *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53 cited by Judge Allen in the case of *Franklin* v. *United States*, supra, and by Judge Sanborn in the opinion in the instant case in the Circuit Court of Appeals for the Eighth Circuit, involved a claim for damages for revocation of special permits granted by the Secretary of War to the Water Power Company, which permits this court held were not property rights for which compensation is contemplated in the Act of March 3, 1909 providing for the revocation of such permits.

In Paragraph 4 of the syllabi in that case it is said:

> "Riparian owners of the shore and appurtenant beds of the St. Mary's river have no right of private property *in the water power* of the stream for which compensation must be made by the United States ***" etc.

The plaintiff's claim in that case was not for the destruction or taking of his property, but for the revocation of a permit or license theretofore granted him by the Secretary of War. It had not a single element of the claim made by plaintiffs in this case, and we submit, affords no support for the doctrine announced by the Circuit Court of Appeals for the Eighth Circuit in the instant case, nor for the doctrine announced in the Franklin case.

The plaintiff's claim in the case of *Northern Transportation Co.* v. *Chicago*, 99 U. S. 635-645 cited by Judge Sanborn in this case, is early disclosed in this court's statement of the case, from which we quote:

"The plaintiffs were the lessees of a lot bounded on the east by the street and on the south by the river, and the principal injury of which they complain is, that by the operation of the City *they were deprived of access to their premises*, both on the side of the river and on that of the street, *during the prosecution of the work*. It is not claimed that the obstruction is a permanent one, or that it was continued during a longer time than was necessary to complete the improvement. ***

"In this case the coffer-dam was only a temporary obstruction. *It was no physical encroachment* upon the plaintiff's property and it was maintained only so long as it was needed for the public improvement." (Italics ours.)

In the case of *Gibson* v. *United States*, 166 U. S. 269-275, the claim involved an interference with plaintiffs' *access to the navigable stream*, and not the flooding or washing away of her land. It is pointed out in stating the case that:

"VIII. There was no water thrown back on claimant's land by the building of said dike, and that said dike has not itself come into physical contact with claimant's land and *has not been the cause of any such physical contact in any other way*." (Italics ours.)

The case of *Scranton* v. *Wheeler*, 179 U. S. 141, 163, also involved a right claimed to uninterrupted access to a navigable stream, as appears in this statement from the opinion of the Court:

"3. The vital question, therefore, is the one heretofore mentioned, namely, whether the prohibition in the Constitution of the United States, of the taking of private property for public use without just compensation has any application to the case of an owner of land bordering on a public navigable river *whose access from his land to navigability is permanently lost* by reason of the construction of a pier resting on submerged lands away from, but in front of his upland,

> and which pier was erected by the United States, not with any intent to impair the rights of the riparian owners, but for the purpose only of improving the navigation of such river."

The three cases last reviewed, appear from the excerpts to have involved interference with access and convenience to the navigable stream and in none of them was there any change in the nature or condition of plaintiff's property, nor was it claimed that any of their lands had been destroyed; therefore they afford no support for the doctrine announced in the Franklin case or in this case, by the Circuit Court for the Eighth Circuit.

The case of *Greenleaf Johnson Lbr. Co.* v. *Garrison*, 237 U. S. 251, 263 cited by the 6th Circuit in the case of *Franklin* v. *United States*, supra, likewise involved a question of interference with access to the navigable stream; and further, the claimed right to maintain a wharf in the shallow water of the stream and up to the navigable thread under a grant from the State of Virginia, after the Secretary of War had established a new harbor line.

Jackson v. *United States*, 230 U. S. 1, 23 and *Hughes* v. *United States*, 230 U. S. 24, 32-34 involved the building of levees in certain basins. Levees, of course, are embankments employed to prevent inundation; it appears in the opinion of the court in these cases, that they were built to prevent the river escaping at certain places. The court pointed out in the course of the opinion, that the United States had done no more than any private citizen of the basin had a right to do. These cases were referred to in the case of *U. S.* v. *Cress*, 243 U. S. 316, and distinguished from the present action in these words:

> "In each of these, there was no direct invasion of the lands of claimant's, the damages were altogether

consequential and compensation was denied on that ground."

The case of *Cubbins* v. *Mississippi River Commission*, 241 U. S. 351, 366, 36 S. Ct. 671, involved practically the same question as that involved in the case of *Jackson* v. *U. S.*, supra.

The case of *Bedford* v. *United States*, 192 U. S. 217, 225, grew out of the construction of a revetment by the government six miles above claimant's land; the revetment so constructed was not designed to, and did not change the current of the river but prevented further changes from natural causes. The court points out in the opinion:

> "In the case at bar, *the works were constructed along the banks* of the river, and their effect was to *resist* erosion of the banks by the waters of the river."

There plaintiff was claiming a property right in the unrestrained operation of the natural propensity of the river, and that if the government prevented the river from following its natural flow, even though it resulted in no actual invasion or destruction of plaintiff's property, he should be compensated. But that is not the complaint here. In this case, the defendant not only prevented the river from moving further away from plaintiffs' land, but by means of dikes and paddle boats, moved the river over until it cut away 95 acres of plaintiffs' land.

In the course of the opinion in this case, Judge Sanborn, speaking for the Court, quotes from the case of *United States* v. *Lynah*, 188 U. S. 445, 470, as follows:

> "It is clear *** that where the government by the construction of a dam *or other public works* so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment." *United States* v. *Lynah*,

188 U. S. 445, 470. See also, *United States* v. *Cress*, 243 U. S. 316. (Italics ours.)

We are constrained to ask: Is not a dike a public work? And is not the value of land destroyed when it is completely washed away, as in this case?

And then again, in the course of the opinion, Judge Sanborn says:

> "The fact that the *inevitable* washing away of the plaintiffs' land by the current was somewhat hastened by artificial means, we think, is of no help to the plaintiffs. The evidence did not show that this 'paddle washing' had enhanced the plaintiffs' injury or had eroded land *which was not already doomed to destruction.*" (Italics ours.)

It is obvious from the record and it so appeared to the Circuit Court of Appeals for Eighth Circuit, and it must be clear to this court, that this land of plaintiffs was "doomed to destruction" when the contract was entered into between defendant and the United States. It was a part of the program of improvement of the Missouri River in making it navigable, that plaintiffs' land be taken. The damage was, therefore, proximate result of the respondent's acts.

There were other cases cited in the Franklin case and also by the Circuit Court for Eighth Circuit, but we will not review them further. Suffice it to say, that not one of them presented a situation in the least comparable to that presented by the record in this case.

It is probably unnecessary for us to call to this court's attention that the law of accretion is applicable to the Missouri River (See *Nebr.* v. *Ia.*, 143 U. S. 359, 12 S. Ct. 396, 36 L. Ed. 186; *DeLong v. Olsen*, 63 Neb. 327, 88 N. W. 512). Also that unless specifically reserved, accretions pass to

the purchaser (*East Omaha Land Co.* v. *Jeffries*, 40 Fed. 386, affirmed 134 U. S. 178, 10 S. Ct. 518, 33 L. Ed. 872; *Topping* v. *Cohn*, 71 Neb. 559, 99 N. W. 372). The law in Nebraska is that riparian owners along navigable streams own their title to the thread of the river. Their title does not stop at the bank or at the high water line as in some other states. (See *Kinkead* v. *Turgeon*, 74 Neb. 580; to same effect, *Sioux City Bridge Co.* v. *Miller*, 12 Fed. (2d) 41). We trust this court will read the Kinkead case just referred to. It states the law in Nebraska now binding upon this court (see *Erie Rr. Co.* v. *Tompkins*, 58 S. Ct. 817, — U. S. —) and its reasoning helps us to see probably the fundamental error of appellee and of the Eighth Circuit Court of Appeals in this case. Judge Letton in the Kinkead case stated:

> "And so with a navigable river of this class, when by reason of natural changes the stream abandons the bed over which, through the instrumentality of its waters the public has the right to pass, the right of passage is as effectually abandoned at that point as when a road is vacated and a new one opened to take its place. The right of the public is to travel in the new road, and its right and privilege to pass over the old one revert to the abutting owners; and so with the river. the public right of navigation attaches to the new channel of the stream by virtue of the change of its waters, over which alone the right of navigation can exist, and the abandoned bed, which is of no avail for public use as a means of travel, reverts to the riparian owners to the thread of the channel where the waters flowed. For these reasons, we are satisfied that the common law as to the rights of riparian owners to the abandoned channel of a navigable fresh water stream is applicable in Nebraska, and not inconsistent with our laws or constitution, and that therefore the plaintiff is the owner of the property in controversy in this action."

The Missouri River, having constantly moved eastward since 1856, the public has lost its right to travel in the old channel now filled with accretion land, the value of which as shown by the testimony in this case is subject to conflicting testimony. The public right of navigation, as is so well stated in the Nebraska case, attaches to the new channel of the stream which lay to the east of the Yearsley land. The right to improve the Missouri River for the purpose of navigation does not entitle the United States Government to improve it anywhere within what in times past has been the bed of the river. Its right to improve it is limited to its channel at the time of the improvement and as we believe, when it completely destroys and washes away plaintiffs' land which he has been using for agricultural purposes, there is a taking of plaintiffs' land for which compensation is payable under the Fifth Amendment to the United States Constitution.

CONCLUSION

We believe the trial court was correct in this case. We believe that the decision of the Eighth Circuit Court of Appeals should be reversed and the trial court affirmed. Yearsley should not be compelled to contribute both his property and his taxes to the improvement of river navigation, when other citizens of the Missouri valley contribute only their taxes. Private property shall not be taken for public use without just compensation. The fact that United States army engineers have ordered the destruction of plaintiffs' property, or corporations or persons contracting with them have taken physical possession of it or have destroyed it without condemnation under the power of eminent domain does not mean that plaintiff should not be paid just compensation for his land and that he is with-

out the protection of the law. We remind this court of that which was so well said by it in another generation:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.
>
> "It is the only supreme power in our system of government, and every man who, by accepting office, parcipates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.
>
> "Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government, and the docket of this court is crowded with controversies of the latter class.
>
> "Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress, and approved by the President, to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without any lawful authority, without any process of law and without any compensation, because the President has ordered and his officers are in possession?
>
> "If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights."
>
> *United States* v. *Lee*, 106 U. S. 196.

Lawrence Yearsley's land may not be worth more than $5 an acre as testified to by defendant's witnesses, but if that

is true this is all the more reason why this court should protect the rights of its poorest citizens and see to it that his property, which admittedly has been completely and immediately destroyed, should not be taken even for a public use without just compensation.

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